Southern Pride Catfish *and* United Food and Commercial Workers Union, Local 1996. Case 10–CA–28960

June 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE, AND MEMBERS LIEBMAN AND BRAME

On March 10, 1997, Administrative Law Judge Howard I. Grossman issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[2] and to adopt the recommended Order as modified.

1. We agree with the judge that the Respondent created the impression of surveillance of employees' union activities and interrogated Pamela Witherspoon in violation of Section 8(a)(1) of the Act. The relevant events occurred during a period of a few weeks at the culmination of a representation campaign at the Respondent's fish processing plant in 1995. On July 31, Freezer Supervisor Greg Crawford met with Doria Lee, a stipulated supervisor in charge of freezer line 2, and other supervisors. Crawford told the supervisors to keep written lists of employees wearing union T-shirts, and that such employees would be fired the Monday following the election. Lee openly recorded the names of about 14 employees. When two employees asked her what she was doing, Lee replied that she was keeping the list as Crawford had directed her. Lee also testified that employees were discussing the list, and that she turned the list over to Crawford.

Lee and Crawford also admitted asking employees how they felt about the Union. On a single day, just before the election, they each asked employee Pamela Witherspoon why she wanted the Union in the plant. Lee told Witherspoon that she was trying to ask everybody what he or she wanted from the Union and wrote down Witherspoon's answer.

We find that telling employees that a list was being kept of employees engaged in union activity, coupled with the disclosure that its purpose was to single out employees for discharge after the election, would reasonably tend to coerce employees in their exercise of protected rights. We find without merit the Respondent's contention that the record reflects a "perfectly legitimate" effort to keep track of the Respondent's standing with employees during the campaign. Contrary to the Respondent, the conduct here is distinguishable from circumstances in which an employer lawfully observes open union support.[3] Here, the stated purpose of recording which employees evinced union support was to facilitate the severest form of retaliation after the election—the swift discharge of union supporters.[4]

As noted above, we further agree with the judge's conclusion that the Respondent violated Section 8(a)(1) by interrogating employee Witherspoon.[5] Supervisors Greg Crawford and Doria Lee each separately asked Witherspoon why she wanted the Union. Lee told Witherspoon that she was trying to ask everybody what he or she wanted from the Union, and she wrote down Witherspoon's answer. In determining whether an employer's questions to an employee about union support constitute coercive interrogation in violation of Section 8(a)(1), the Board looks at "whether under all the circumstances the interrogation reasonably tends to interfere with rights guaranteed by the Act."[6] In *Bourne v. NLRB*,[7] the court held that an interrogation "not in itself threatening" would be examined in light of the following factors: the background of the interrogation, the nature of the information sought, the questioner's identity, the place and method of the questioning, and the truthfulness of the reply.[8]

Applying these factors, we find that the interrogation of Witherspoon by Lee and by Crawford occurred against a background of threats to discharge employees for union support, as well as other serious threats, i.e., to move or close the plant or to reduce wages if employees were to choose the Union. These threats emanated from the highest levels of plant authority, and created an atmosphere of interference and coercion. We find further that the nature of the information sought from Witherspoon—why she wanted the Union—was particularly coercive in this context. Given that Lee made known, as found by the judge in section II, A of his decision, that union supporters were going to be discharged on the Monday following the election, and given that Lee, at the behest of the Respondent, was writing down the names of employees who wore union T-shirts, Lee's

[1] On November 25, 1998, the Board granted the Petitioner's request to sever Case 10–RC–14631 from the current proceedings.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] See, e.g., *Roadway Package System*, 302 NLRB 961 (1991) (a supervisor's open observation of employee handbilling at and near plant was not unlawful).

[4] See, e.g., *Burlington Industries*, 257 NLRB 712 (1981), modified on other grounds 680 F.2d 974 (4th Cir. 1982) (employer informed employees that it was maintaining a list of union supporters, with threat of discharge).

[5] Although the complaint alleged that the Respondent "unlawfully interrogated its *employees*" (emphasis added), and the judge repeated this formulation in his decision, the judge dealt only with the questioning of Witherspoon by Crawford and Lee.

[6] *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Member Brame would find that interrogating an employee is not per se unlawful, and that "[t]o fall within the ambit of Section 8(a)(1) of the Act, the words themselves or the context in which they are used must suggest an element of coercion or interference" citing *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980), quoted with approval in *Rossmore House*, supra.

[7] 332 F.2d 47, 48 (2d Cir. 1964), cited on *Rossmore House*, supra.

[8] Id. at 48.

questioning of Witherspoon and recording of her replies was clearly coercive. Crawford, a higher-level supervisor, was the person directly responsible for Lee creating the list of employees who wore union T-shirts. Under all the circumstances, then, we find, in agreement with the judge, that the Respondent's interrogations violated Section 8(a) (1) of the Act.

2. We also agree with the judge that that Steven C. Moore, the pastor of a local church, was acting as an agent of the Respondent by meeting with employees, and that his comments to employees respecting the outcome of the election constituted threats of plant closure in violation of Section 8(a)(1) of the Act. As the judge found, Moore became interested in the campaign to organize the Respondent's facility because individuals who attended his church were employed by the Respondent. Moore testified that he felt that the community did not need a union, and he called the Respondent's Human Resources Director Mary Hand, expressed his opposition to union organization of the plant, and asked to speak to employees. Hand agreed, and Moore spoke to employees at the Respondent's "Pride Center," or break area, on 10 occasions. On each occasion, about 30 employees attended, and Hand, or the Respondent's owner, Joe Glover, or its labor consultant, Joe Alecs, introduced him. At these meetings, Hand and Alecs also addressed employees, and Glover dropped in occasionally. With respect to the content of Moore's interchanges with employees, the judge found that Moore asked employees to give Glover a chance, and told them that if the employees chose the Union, Glover could relocate the plant. Moore testified that he had discussed with employees the "possibility" that the Respondent would close down if the employees chose the Union. The judge found, and we agree, that Moore made his statements about the closings of other facilities after unionization in the context of coercive threats, and conveyed to employees the message that if they chose the Union they would lose their jobs.

With respect to Moore's status as an agent of the Respondent, we note that the Board has found individuals outside an employer's management or supervisory hierarchy to be agents of the employer, even when the record lacks evidence that the employer directly sought their involvement in a union campaign. In *Dean Industries*,[9] the Board found that 10 citizens of the community, in which the respondent operated a furniture factory, were acting as agents of the respondent by holding meetings with employees in city hall, during which they solicited employees to withdraw authorization letters, and that the respondent had violated Section 8(a)(1) by threats of plant closure made in connection with the solicitations. The Board found evidence of the existence of a "cooperative effort"[10] between management and the townspeople to defeat the union. As the Board in *Dean* stated:

> While strict rules of agency are not required to be applied in determining an employer's responsibility for the conduct of others, nevertheless, before an employer may be found to have engaged in unfair labor practices by reason of activities on the part of persons not in its employ or management and whom it did not clothe with the apparent authority to act for it, at the minimum, the employer must have acquired knowledge of the activities for which it is sought to be charged and the circumstances must be such as to place the employer under an obligation to disavow activities.[11]

Like the respondent in *Dean*, the Respondent not only failed to disavow the comments, but also invited Moore onto its premises numerous times, had members of its management hierarchy introduce him to employees, and Hand or Glover, or its labor consultant Alecs, remained in the Pride Center during his remarks. Further, the Respondent, unlike the employer in *Dean*, made its own facilities available to Moore. Thus, it is evident that the Respondent, even more than the employer in *Dean*, was engaged in a "cooperative effort" with Moore to oppose the union through unlawful means.[12]

3. We also agree with the judge that the Respondent violated Section 8(a)(1) by discharging Supervisor Doria Lee because her subordinates continued to wear union T-shirts and because she was, in the Respondent's view, ineffective in persuading her subordinates to reject the Union and to abandon the expression of their Section 7 rights. The Respondent argues that, even assuming Lee was discharged for the reasons stated above rather than because she lacked control over the employees she supervised and those employees took excessive breaks, as the Respondent has asserted, the discharge of a supervisor for failing to persuade employees to reject a union is not an unfair labor practice. In support, the Respondent relies on *World Evangelism*, 261 NLRB 609 (1982) (employer did not violate 8(a)(1) by discharging supervisor; there was no evidence that it expected the supervisor to employ unlawful means in union campaign). We find *World Evangelism* distinguishable from the present case.

In *World Evangelism*, the Board reversed the judge's finding that the respondent had violated Section 8(a)(1) by discharging a supervisor for failing to dissuade employees from supporting the union. The Board found that the evidence was insufficient to warrant the judge's conclusion that the supervisor had been discharged for failing to engage in unfair labor practices. In this case, by contrast, the Respondent unlawfully instructed Lee and other supervisors, a few days before the election, to compile lists of all employees who wore union T-shirts and told the supervisors that all

[9] 162 NLRB 1078 (1967).
[10] Id. at 1092.
[11] Id. at 1093 (footnotes omitted).
[12] Id. at 1092. See also *Wallace International de Puerto Rico, Inc*., 328 NLRB 29 fn. 2 (1999) (conduct of mayor of nearby community is attributable to respondent, as mayor acted as its agent; respondent ratified mayor's threats of relocation by using them in video and clothed the mayor with the apparent authority to speak for it).

such employees would be discharged after the election. Lee followed these instructions, openly writing down employees' names and telling employees what she was doing and that she was acting under the Respondent's instructions.

Like the judge, we find that *Talladega Cotton Factory*, 106 NLRB 295 (1953), enfd. 213 F.2d 209 (5th Cir. 1954), provides more persuasive precedent. In that case, the Board found that the respondent violated Section 8(a)(1) by discharging two supervisors for half-hearted participation in unlawful union campaign. As here, the Board held that the employees were aware that a supervisor was engaging in antiunion unfair labor practices at the behest of the employer. Moreover, the supervisor's discharge followed immediately upon the heels of an election, as was the case here. Thus, in both cases, "the discharge was 'part of [the respondent's] plan to thwart [employees'] self-organizational activities.'" We find, as did the Board in *Talladega*, that "the net effect of this conduct was to cause non-supervisory employees reasonably to fear that the Respondent would take similar action against them if they continued to support the Union,"[13] and that the discharge of Lee violated Section 8(a)(1) of the Act.

4. We also agree with the judge that the employees' walkout in protest of the discharge of Supervisor Doria Lee constituted protected concerted activity, that the Respondent discharged the employees, and that the discharges violated Section 8(a)(1).[14] In so finding, we note that even if the Respondent had acted lawfully in discharging Lee, her subordinates' walkout would still constitute protected conduct under the four-part test articulated in *NLRB v. Oakes Machine Corp.,* 897 F.2d 84, 89 (2d Cir. 1990):

> [C]oncerted activity to protest the discharge of a supervisor . . . may be "protected," provided the identity of the supervisor is directly related to terms and conditions of employment.
>
> Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of the circumstances, including (1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; (3) whether the identity of the supervisor is directly related to terms and conditions of employment; and (4) the reasonableness of the means of protest.

As the judge found, the employees left the production line because, after Lee's discharge, they heard through employee Joe Jackson that Lee had been discharged because the employees she supervised were wearing union T-shirts. Thus, the protest clearly originated with employees, and no other supervisors were involved at all. Moreover, Doria Lee was a first-line supervisor who dealt with the employees on her production line every day. Whether Lee remained as the employee's supervisor was clearly related to the employees' terms and conditions of employment, and even more importantly, to their Section 7 rights, because her discharge was viewed, as the judge found, as an event that would affect all of the involved employees. In this regard, in discussing Lee's discharge, the employees expressed, among other things, the fear that they might be the next to be fired, and that Lee's discharge was the first of those that the Respondent had predicted before the election. Finally, the employees' protest was reasonable, as, according to credited testimony, the production line was not operating when the employees walked off, so there would have been no disruption of production. Thus, the employees were acting in protest of employer conduct that clearly affected their own working conditions, and their walkout is protected concerted activity under the standards of *Oakes Machine Corp*.

5. We also agree with the judge that Pamela Witherspoon's discharge violated Section 8(a)(3) and (1). We agree that the judge correctly found that the General Counsel established a prima facie case. Thus, the Respondent had knowledge of Witherspoon's union activities because she wore a union T-shirt while working, and she was the target of unlawful interrogation by her supervisors, Lee and Crawford. Further, Witherspoon was discharged only a week after the Respondent's declaration that it was going to discharge all employees, like Witherspoon, wore union T-shirts. Indeed, she was fired immediately after returning to work from her 1-day absence on the day that all eight of her line 2 coworkers were unlawfully discharged for protesting the Respondent's unlawful discharge of their supervisor, Doria Lee. We further find that the Respondent has completely failed its burden of establishing that it would have discharged Witherspoon for legitimate reasons even in the absence of her union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As found by the judge, the Respondent's witnesses contradicted each other concerning the asserted reason for Witherspoon's discharge. The judge discredited the testimony of Supervisor Crawford that he simply sent Witherspoon home because she refused to work with her coworkers, and instead credited Witherspoon's testimony that Plant Manager Bobby Collins discharged her assertedly because she refused to wear a white trash bag at work instead of the customary blue apron, so that she might be more visible in the Respondent's sales video being produced that day. Collins testified that the discharge was based on Witherspoon's failure to wear a white trash bag, while Crawford denied that the refusal to

[13] 106 NLRB at 297.

[14] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (cited by the judge) (walkout over workplace temperature was protected; involved were a "small group of employees who were totally unorganized. They had no bargaining representative and, in fact, no representative of any kind. . . . Under these circumstances, they had to speak for themselves as best they could").

wear the bag had anything to do with the discharge. Particularly since the Respondent's witnesses could not even agree as to the alleged reasons for the discharge, it is clear that those reasons were pretextual, and thus we adopt the judge's conclusion that the Respondent has not met the burden of showing that Witherspoon would have been discharged even in the absence of her protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Southern Pride Catfish, Greensboro, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the word "ORDER" for the judge's recommended heading.

2. Delete the paragraph beginning "IT IS FURTHER ORDERED" following paragraph 2(f).

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid and protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT create the impression of surveillance of our employees' union activities by maintaining lists of union supporters and telling employees that it is being done at management's direction.

WE WILL NOT coercively interrogate our employees concerning their union activities or sympathies.

WE WILL NOT threaten employees with reduction of wages, loss of jobs, or plant closure if they vote for the Union.

WE WILL NOT discharge supervisors because of their failure to suppress employees' expressions of union support.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Doria Lee, Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, Bridgette Witherspoon, and Pamela Witherspoon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Doria Lee, Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, Bridgette Witherspoon, and Pamela Witherspoon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify the employees that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, rescind our rule restricting the bathroom breaks of our employees, and reinstate the policy in effect prior to the advent of the union movement.

SOUTHERN PRIDE CATFISH

Edward A. Smith, Esq., for the General Counsel.

Scott McLaughlin, Esq. and *Barry Frederick, Esq. (Johnson, Barton, Proctor & Powell)*, of Birmingham, Alabama, for the Respondent.

James D. Fagan Jr., Esq. (Stanford, Fagan, & Giolito), of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN**,** Administrative Law Judge. The original charge was filed on December 13, 1995,[1] by United Food and Commercial Workers Union, Local 1996 (the Union or the Petitioner) and an amended charge on March 14, 1996. Complaint issued on March 22, 1996, and alleges that Southern Pride Catfish (Respondent or the Employer) discriminatorily restricted the breaks of employees suspected of being union supporters, unlawfully interrogated employees regarding their union sentiments, gave its employees the impression of surveillance of their union activities, imposed an onerous rule for discharge upon an employee, threatened its employees with loss of their jobs if they supported or voted for the Union, threatened its employees with plant closure if they voted for the Union, threatened its employees that they would "lose everything" if they voted for the Union, threatened its employees with loss of wages if they voted for the Union, and told them that the owner wanted them terminated because they wore union T-shirts.

The complaint also alleges that Respondent promised employees more than the Union could give them to dissuade their support from the Union, and solicited grievances to induce employees to vote against the Union.

Finally, the complaint, as amended, asserts Respondent discharged Supervisor Doria Lee because the employees under her supervision supported the Union. The Respondent also discharged

[1] All dates are in 1995 unless otherwise stated.

nine employees, the complaint alleges, because they supported the Union and engaged in protected, concerted activity—Carrie Hamilton, Debbie Lewis, Barbara Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Bridgette Witherspoon, Brenda Scott, and Pamela Witherspoon.

In Case 10–RC–14631, the Board conducted an election among employees in an appropriate unit on August 4, based on a petition filed by the Petitioner on June 19. Among approximately 428 eligible votes, 123 cast valid votes for and 251 cast valid votes against the Petitioner. Challenged and void ballots were insufficient in number to affect the results of the election. The Petitioner filed timely objections to the election and, on April 5, the Acting Regional Director consolidated the two cases for hearing.

I heard these cases in Tuscaloosa, Alabama, on May 28 and 29, 1996. Thereafter, the General Counsel, the Union, and the Respondent filed briefs. On the basis of the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Alabama corporation with an office and place of business in Greensboro, Alabama, where it is engaged in the business of processing fish. In the 12 months preceding issuance of the complaint, Respondent purchased and received at its Greensboro, Alabama facility goods valued in excess of $50,000 from points located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED VIOLATIONS OF SECTION 8(a)(1)

A. The Alleged Impression of Surveillance

1. Summary of the evidence

The complaint alleges that Respondent gave its employees the impression of surveillance of their union activities by openly maintaining lists of union supporters and by telling its employees that such lists were being maintained at the direction of upper management. The parties stipulated that Doria Lee was a supervisor. She supervised about 40 employees on a freezer line. Lee testified that her own supervisor was Greg Crawford. She averred that, on July 31, a few days before the election, she attended a meeting with Crawford and other supervisors. According to Lee, Crawford instructed the other supervisors to make written lists of all employees who wore union T-shirts. He said that they would be fired on the Monday following the election. Lee did as directed, and wrote down the names of 14 employees who were wearing union T-shirts.[2] She did this openly, and two employees asked her why she was doing it. Lee replied to one of them that she was doing as directed by Supervisor Crawford and further affirmed that she overheard employees discussing the list. Lee testified that she gave the list to Crawford.

Greg Crawford denied that he ever told Doria Lee to make a list of employees wearing union T-shirts, or that the employees on the list would be fired after the election. However, he agreed that Lee told him that she had written down the names of employees who favored the Union. Lee did not tell him what she was going to do with the list.[3]

2. Factual and legal conclusions

Doria Lee's testimony that she openly wrote down the names of employees wearing union T-shirts, discussed it with two of them, and overheard employees discussing the matter is uncontradicted and credited. This activity could only have created the impression among employees that Respondent was recording their union activities and sympathies, and was thus engaged in surveillance of these activities and sympathies.

Since Doria Lee herself was a supervisor, her conduct is attributable to Respondent, and it is unnecessary to decide, for this reason whether Greg Crawford instructed her do this. However, I conclude that Crawford did so instruct her, and told her that the listed employees would be discharged after the election. Lee was more truthful in demeanor than Crawford, and the latter's assertion that Lee did not tell him what she was going to do with the list is unrealistic. Why would Lee tell her own supervisor about such a list without stating her purpose? In fact, Lee would have had no reason to engage in such conduct without explicit instructions from management. Finally, Lee's conduct was consistent with Respondent's efforts to ascertain the union sympathies of its employees, described hereinafter.

Respondent, by openly maintaining lists of union supporters and informing them that this was being done at the direction of management, unlawfully created an impression of surveillance of its employees' union activities and sympathies, and violated Section 8(a)(1). *Hicks Oil & Hicksgas*, 293 NLRB 84, 96–97 (1989).

B. The Alleged Unlawful Interrogation

Supervisor Greg Crawford testified that he asked employees about how they felt about the Union. Thus, he asked this question of Pamela Witherspoon, and she replied that she wanted the Union in order to get higher wages and improved working conditions.

Witherspoon corroborated Crawford's testimony, and stated that it took place before the election. She also testified without contradiction that Supervisor Doria Lee, on the same day as Crawford's interrogation, asked her why she wanted the Union. Witherspoon answered Lee, and the latter wrote down the answer.

The supervisors advanced no reasons to the employees for the questions, and Respondent had no legitimate reason for them. They did not assure the employees that there would be no reprisals, and, in fact, there were reprisals as described hereinafter. The inquiries took place shortly before a Board election while Respondent was systematically attempting to ascertain its employees' union sympathies and threatening them, as set forth hereinafter. Accordingly, the interrogation tended to interfere with, restrain, or coerce the employees in the exercise of their statutory rights, in violation of Section 8(a)(1). *Rossmore House*, 269 NLRB 1176 (1984).[4]

[2] Lee could recall the names of Pamela Davis, Bridgette Witherspoon, Carrier Hamilton, Rosie Aaron, Shirley Aaron, and Brenda Scott.

[3] The complaint alleges and the answer denies that Greg Crawford was a supervisor. However, Doria Lee testified that, when she was hired, Plant Manager Collins told her that Crawford was her supervisor. Crawford instructed her on what to do and approved Lee's disciplining of employees and her granting of overtime. Crawford was also the supervisor of Carrie Evans, who was in charge of another freezer line. Finally, Crawford himself admitted that he was a supervisor at this time, and I so find.

[4] Some of the factors noted in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), are present in this case.

C. The Alleged Threats of Plant Closure and Loss of Wages

1. Statements of Joe Glover

a. Summary of the evidence

Joe Glover was Respondent's owner, and an admitted supervisor. Former Supervisor Doria Lee testified that Respondent held five or six meetings with employees in the 2-week period preceding the election. Joe Glover spoke at three of these meetings. He told employees that another company, Farm Fresh, had closed after unionization. He also said he would reduce employee compensation to the minimum wage and close the plant down if the Union came in. On cross-examination, Lee agreed that Glover said he would have to bargain with the Union if it came into the plant, but denied that he said anything about what would happen in bargaining. She agreed that Glover said the Union could only get what he agreed to, that you can negotiate both ways, that this meant the employees might get less, and that the only thing he had to do by Federal law was pay the minimum wage.

Barbara Lewis testified that she attended a meeting about a week before the election, at which Glover said that he would close the plant down before he would let the Union in, and that, if he did let it in, he would take 25 cents away from employees wages and drop wages to $4 an hour. Lewis testified on cross-examination that the minimum wage was then $4.25 per hour, and that Glover's statement amounted to saying that he was going to pay employees at below minimum wage if the Union came in. Lewis did not recall Glover saying anything about bargaining or Farm Fresh Foods in this speech, and denied that Supervisor Doria Lee was present.

Pamela Witherspoon testified that she was making $4.35 per hour. She attended about five meetings, at two of which Glover said that he would reduce everybody's wages to $4 per hour if the Union came in. He also said that the Union could not do anything for the employees. Witherspoon agreed that Barbara Lewis, Regina Lewis, and Debbie Lewis were present at some of the five meetings, but denied that Barbara Lewis or Doria Lee was present at the meetings which she attended when Glover was speaking. On cross-examination, Witherspoon denied that Glover said anything about bargaining, bargaining in good-faith, bargaining being a two-way street, giving and taking in bargaining, or anything about Farm Fresh Foods.

Regina Lewis testified that she attended meetings at which Glover said that he could move the plant somewhere else if the Union came in. Debbie Lewis testified that she attended several meetings after the union campaign started and that Glover several times said that if the Union came in he would close the plant down and move somewhere else. Glover also said that the employees would get nothing, because everything he had was in his wife's name.

Joe Glover testified that, after the union campaign began, Respondent instituted a system for determining which employees were union supporters, and who did not support the Union. Supervisors reported daily on these matters to Jay Cole or Joe Alecs, who were management consultants. Glover was asked whether he told employees that the Company would close if the Union came in, or that they would lose their jobs, or lose pay and benefits, or that their pay would be reduced to $4 an hour, or that they would lose 25 cents per hour. Glover answered, "No" to each question. He stated that he told employees that he would bargain in good faith with the Union if it won the election, and that if employees lost benefits it would be the result of the bargaining process. Glover was corroborated by Plant Manager Bobby Collins and timekeeper, Diane Watkins.

Sheila Hambright, a supervisor at the time of her testimony, stated that employees were saying that Glover had said he was going to close the plant. She attended a meeting where Glover was supposedly trying to "clear that up." What he did say was that all he had to pay was minimum wage. Some employees were making more than minimum wage. Glover also said that that the employees did not need a Union, according to Hambright.

b. Factual and legal conclusions

Respondent argues that the allegations against Glover are "illogical." He hired two consultants (Jay Cole and Joe Alecs) to teach him what he could and could not say, and it is "incredible that he would ignore them and promptly and consistently make illegal statements."[5] This argument begs the question by assuming that Glover's intent was to hire consultants to assure that he would make only "legal" statements to employees. Although Glover asserted that he hired consultants to tell supervisors what they could and could not tell employees, he also testified that Alecs ran a "consulting business to discourage unions," and that he brought Alecs into the plant to speak to Glover's employees. One permissible inference from this testimony is that Glover's purposes was to defeat the union movement.

Although Doria Lee gave testimony about statements by Glover concerning bargaining, the other witnesses testified to the contrary, and affirmed that Lee was not present at meetings when Glover failed to make statements about bargaining. For this reason, I conclude that the General Counsel's witnesses were not inconsistent. Their demeanor was that of truthful witnesses.

Respondent's witnesses, including Glover, were perfunctory in their denials of the statements attributed to Glover. Their demeanor did not have the quality of verisimilitude found in the testimony of the General Counsel's witnesses. One of Respondent's witnesses, Sheila Hambright, corroborated the General Counsel's evidence that Glover said all he had to pay was minimum wage, and that some employees made more than that. For these reasons, I credit the statements attributed to Glover by the General Counsel's witnesses.

Respondent argues that Glover's statements recited by Lee on cross-examination were "legal." This overlooks the absence of any such statements in other meetings, as well as Glover's unlawful threats. Respondent cites various cases, including *Shaw's Supermarkets v. NLRB*, 884 F.2d 34 (1st Cir. 1989), which, it asserts, stands for the proposition that an employer's statement that he would start bargaining from minimum wage was legal. This is not an accurate statement of the court's holding. The court discussed various Board cases, some holding that the employer's statements were lawful, and others where they were illegal. The court cited *Mississippi Chemical Corp.*, 280 NLRB 413, 417 (1986), where a statement that the result of a union victory would be to "knock down" all wages and "take away benefits" constituted an "express threat" that bargaining would begin only after the employees' wages had been reduced to minimum benefit and all their benefits taken away (884 F.2d at 40).[6] Glover made express threats that he would reduce all employees' compensation to the minimum wage level if the Union came in. He also threatened to move the plant elsewhere. These statements were unlawful under current Board law, and I so find.

[5] R. Br. 50.

[6] *Shaw's Supermarkets* is discussed in *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 509–510 (1995).

2. Joe Alecs

a. Alecs' status

As set forth above, Joe Alecs[7] ran a "consulting business to discourage unions," in Company Owner Glover's language. Respondent's owner brought him in to talk to the employees. Alecs testified that he spoke to employees about the "horrors" of unionism. Plant Manager Bobby Collins testified that, "based on Alecs' instructions, the supervisors gathered information on the union sympathies of the employees." I conclude that Respondent was responsible for Alecs' conduct. *Streamway Division of the Scott Fetzer Co.*, 249 NLRB 396, 401 (1980).

b. Summary of the evidence

The complaint alleges that, about 2 weeks before the election, Alecs threatened employees with loss of their jobs and plant closure if they voted for the Union, and told them that they would "lose everything." Several of the General Counsel's witnesses testified about a conversation with Alecs before the election. They were seated on the steps of the Pride Center, a breakroom, and Alecs was inside. All the employees were wearing union T-shirts. Debbie Lewis testified that Alecs was inside the Pride Center looking out and laughing at the employees. According to Lewis, Alecs came out and told the employees that after Friday they were going to have to find a place to work—"it won't be here."

Bridgette Witherspoon stated that Alecs and Glover were together, and were laughing at the employees. Alecs came out and said that after election day the employees would have to work somewhere. Witherspoon asked whether they would be fired, and Alecs replied, "I'd rather not say."

Pamela Witherspoon testified that Alecs said that "if the Union came in the plant would close down, and the employees would have to look for other jobs." All of this testimony pertains to statements from Alecs outside the Pride Center. Pamela Witherspoon also testified that, in a speech inside the Pride Center, Alecs said that the plant would close down if the Union came in, and that the employees would not gain any benefits.

Alecs denied making the statements attributed to him by the General Counsel's witnesses. However, he agreed that the latter sometimes sat on the steps of the Pride Center, and that he had to walk "around" them or "through" them to get inside. He denied that he had a conversation with them, but affirmed that he was "subjected to some ridicule." "I just went out there and made comments like 'What's going to happen when we win the election, and things like that.'"

c. Factual and legal analysis

There is some variation in the testimony from the General Counsel's witnesses, the principal one being whether Alecs specifically or impliedly stated that the employees would have to find other jobs if the Union came into the plant. However, the evidence is substantially consistent that Alecs said the employees would have to work elsewhere if the Union won. When asked whether the employees would be fired if the Union won, he replied, "I'd rather not say"—an answer which could reasonably have been construed to mean that they would be fired.

Alecs acknowledged that the employees were sitting on the steps to the Pride Center. After denying that he had a conversation with them, Alecs admitted that he went "out" and asked what was going to happen if the Company won the election, i.e., he discussed the probable result of the election.

The General Counsel's witnesses were truthful in demeanor, and their testimony was substantially consistent. Alecs' testimony partially corroborated the General Counsel's evidence. I find that he told the employees that the plant would close down and that they would have to look for other jobs if the Union won. Respondent is responsible for Alecs' statements, and violated Section 8(a)(1).

3. Steven C. Moore

a. Moore's status and involvement in the campaign

Steven C. Moore testified that he was a pastor at a church in Greensboro, Alabama. He had parishioners who worked at Respondent's plant, and heard that a union campaign had started there. Reverend Moore testified that this concerned him, because he felt the community did not need a union. He had worked in a union shop, and unionization led to adverse circumstances.

Reverend Moore called Human Resource Director Mary Hand, said that he was concerned about the matter, and asked for permission to speak to employees. Hand said that this would be acceptable, and Reverend Moore thereafter spoke to employees in the Pride Center on more than 10 occasions. There were about 30 employees present on each occasion. Moore was introduced to employees by Human Resources Director Hand or Company Owner Joe Glover. Hand also spoke to employees, as did Joe Alecs. Company Owner Joe Glover came in occasionally, and said, "Hi," to employees.

Reverend Moore's introduction to employees by the Company's human resources director or the owner, the utilization of the Company's breakroom for the meetings, the speeches to employees by Hand and Alecs and the occasional presence of Company Owner Joe Glover put Reverend Moore in a position to be identified by employees with management. Accordingly, I find, he was an agent of Respondent. *Montgomery Ward & Co.*, 228 NLRB 750 (1977).

b. The evidence as to Moore's statements

The complaint alleges that Moore threatened employees with plant closure if the Union won the election. Barbara Lewis testified that she attended a meeting at which Moore spoke, about 2 weeks before the election. He told the employees to give Glover a chance. If the Union came in, he could move the plant elsewhere. Pamela Witherspoon testified that she attended a meeting at which Moore said that the employees would lose their jobs if the Union came in, and that they could not go on welfare because "they" were going to cut it out.

Moore testified that he tried to tell the employees that getting into the Union was not good for them, and would have an adverse impact on the community. The employees could be out on strike which would affect their welfare, and slow downs occasioned by union objections to work schedules. There were places closing down around the country. Moore was asked on cross-examination whether he ever told the employees that Respondent would close down. He replied that it was a "possibility," and agreed that he discussed the subject with employees.

c. Factual and legal conclusions

Moore partially corroborated the General Counsel's witnesses, and I conclude that he did, as affirmed by the latter, tell the employees that Glover could move the plant elsewhere if the Union came in, and that the employees would lose their jobs. Moore's statements about other plant closings were made in a context of unlawful threats, and also conveyed to employees the message that

[7] Alecs' last name was given as "Allen" in the complaint, but this was corrected by amendment at the hearing.

the Union's success would result in the loss of their jobs. *Mediplex of Danbury*, 314 NLRB 470 (1994). Accordingly, Respondent, by Moore's statements, violated Section 8(a)(1).

D. The Alleged Restriction of Breaks of Employees Believed to be Union Supporters

1. Summary of the evidence

The complaint alleges that Respondent discriminatorily restricted the breaks of employees believed to be union supporters. The evidence pertains to the Company's alleged restriction on the frequency of employee visits to the bathroom.

Respondent's witness Diane Watkins was the timekeeper, and recorded the employees going to the bathroom. She testified that "sometimes" there was too great a frequency of such visits, but that there was no difference in the frequency before or after the union campaign started. Supervisor Sheila Hambright testified on May 29, 1996, that there had been a problem of too many bathroom breaks which had been going on for the prior 2 or 3 years, i.e., prior to the filing of the petition on June 29, 1995. Hambright was one of those who went to the bathroom too frequently, but never received a warning and was promoted to supervisor. The General Counsel's witnesses testified that, prior to the advent of the union campaign, there had been no criticism of the number of times employees went to the bathroom.[8]

Barbara Lewis was wearing a union T-shirt about a week before the election, and was on her way to the bathroom, which was located in the breakroom. Company Owner Glover told her to go back to work, and she answered that she was on her way to the bathroom. Glover responded that she did not have to use the bathroom, because he had seen her going there that morning 15 to 17 times. Lewis told him to go back and check the list, because her name was not on there 15 or 17 times. Glover finally let her go to the bathroom, but followed her when she left the breakroom and said, "You think this is a joke." Glover tugged at his own shirt when saying this, and Lewis interpreted his statement as a reference to her own union T-shirt. Lewis affirmed that she had never been warned previously about trips to the bathroom.

Bridgette Witherspoon testified without contradiction that on the Tuesday before the election Glover said that employees were taking excessive bathroom breaks—15 a day—that he was not going to tolerate it, and that people who went back and forth to the bathroom would be fired. "Hold on," Glover said, "[O]ne of the main ones is coming right now." At that point Barbara Lewis entered the meeting room wearing a union T-shirt.

2. Legal conclusions

Glover's statement that employees taking too many bathroom breaks would be fired amounted to the promulgation of a new rule restricting such breaks. There had been no such restrictions before the union campaign. This fact, coupled with Respondent's unlawful threats and the timing of Glover's statement, shortly before the election, warrants an inference that the new rule was discriminatory in nature, and was in retaliation against the employees union activities. I conclude that Respondent thereby violated Section 8(a)(3) and (1). *La Reina, Inc.*, 279 NLRB 791 (1986).

E. The Discharge of Doria Lee

Doria Lee began working for Respondent in February 1986, and was discharged on August 7, 1995. Her supervisor for the last 9 or 10 months of her employment was Greg Crawford.

Respondent had two "freezer lines," designated as line 1 and line 2. The latter was established in May 1995, and Lee was made supervisor of the line, over approximately 40 employees. The employees on line 2 were relatively new, while those on line 1 were more senior. Supervisor Crawford testified that he never disciplined Lee during the time he supervised her. Although Plant Manager Collins had spoken to her about production, this apparently occurred a short time after Lee took over line 1, in May. By August, according to Crawford, things were improving and "we had come a long way."

Doria Lee testified that she was called to the office on the morning of August 7, 3 days after the election. Plant Manager Collins told her that she was fired because her employees were still wearing union T-shirts and going to the bathroom. If Collins had his way, he would not have fired her, but Joe Glover wanted her discharged.

Collins testified that he spoke to Lee about low production on her line approximately 5 or 6 weeks before the election. He did not give her a written warning. She was a good employee before she became a supervisor, and was good enough to be promoted to that position. She was trying to do a good job as supervisor, but was not capable. Her production was down, and she could not "handle" her employees. Lee asked to be transferred back to a nonsupervisory job, but Collins felt that she could not work alongside the employees whom she had supervised on line 2. Collins agreed that he could have transferred her to a nonsupervisory position on line 1. Collins did not consult Greg Crawford about the matter, because the Company was unhappy with Crawford as a supervisor over the freezer lines. Collins denied speaking to Lee about her employees' wearing union T-shirts. He agreed that he had previously asked her questions about the union sympathies of her employees. On cross-examination, Collins agreed that the Company had production records. (Respondent in fact produced 1 day's record, for another purpose.) He also knew that he would be called upon to give a reason for Lee's discharge, but did not think it "relevant" to bring the production records. With respect to "excessive walking" on line 1, Collins said that the Company did not maintain any records of this.

Joe Glover testified that Lee was discharged because she could not control her employees, and her production was not good.

Supervisor Greg Crawford stated that he was not informed prior to Lee's discharge. Plant Manager Collins later told him, but did not give a reason.

Factual and Legal Conclusions

Respondent's proffered reasons for the discharge of Doria Lee are not supported by credible evidence. Although Respondent had production records which could have been introduced to support its "low production" reason for Lee's discharge, it failed to produce any such records. Under established Board practice, I make an adverse inference from such failure and conclude that, if introduced, the records would not have supported Respondent's position. I note Supervisor Crawford's testimony, that, although Plant Manager Collins had spoken to Lee about production, this occurred soon after line 2 was established, and Lee was never warned. Further, matters had "come a long way" by August, and Lee had improved. Accordingly, I conclude that Respondent has not established "low production" as a reason for discharging Lee.

The "walking around" reason is even vaguer. If Respondent means that the "walking around" resulted in low production, this reason has already been considered and rejected. If it means excessive trips to the bathroom, the evidence considered above shows

[8] Testimony of Barbara Lewis, Pamela Witherspoon, Bridgette Witherspoon, and Debbie Lewis.

that there was no more frequency of bathroom visits after the campaign started than there was previously.

Although Collins denied telling Lee that the wearing of union T-shirts by her employees was a reason, he admitted asking her about the union sympathies of her employees. Lee was a more believable witness than Collins, and I credit her testimony that the latter told her that she was being discharged because her employees were wearing union T-shirts and were going to the bathroom too frequently (an unsupportable reason as I have found). Although the evidence shows that other employees also wore union T-shirts, it also shows that Lee's employees did so with greater regularity.

Respondent's hostility to the union movement is established by the threats made by Glover, Alecs, and Moore. I conclude that Respondent discharged Lee because she was not effective in getting her employees to reject the Union. The facts in this case are indistinguishable from those in *Talladega Cotton Factory*, 106 NLRB 295 (1953). There the Board concluded that the employer's discharges of supervisors because they failed to support effectively the employer's efforts to defeat the union demonstrated to employees that the same thing would happen to them if they continued to support the union. Accordingly, the supervisory discharges violated Section 8(a)(1). Respondent's unlawful motive herein is buttressed by the harshness of its discipline of Lee. Instead of transferring her to nonsupervisory work—which Collins admitted could have been done, on line 1 if necessary—Respondent chose the extreme penalty of discharge. I conclude that it thereby violated Section 8(a)(1) of the Act.[9]

F. The Discharges of Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, and Bridgette Witherspoon.

1. The departure from line 2

a. Summary of the evidence

The complaint alleges that Respondent discharged the employees listed above on August 7, 1995, because of their union and protected concerted activities. All of these employees had been supervised by Doria Lee except Barbara Lewis, who was Lee's sister.

Bridgette Witherspoon testified that, on the morning of August 7, all of the employees on line 2 were wearing union T-shirts. An employee named Joe Jackson told her that Doria Lee had been discharged because her employees were wearing union T-shirts. She and other employees discussed the matter, saying that there was no need to fire Doria Lee because the employees were wearing union T-shirts, and that they might be the next to be fired. The employees decided to walk out and talk to Doria Lee. The line was "down" at this time, according to Witherspoon, and there were no fish. This had happened in the past, and, when it did, employees were permitted to go to the breakroom or down the hill, until called back to work. Witherspoon stated that she intended to return to work as soon as somebody came and told them to return.

Regina Lewis testified that she and her fellow employees discussed Lee's discharge and were upset about it. They decided to "protest," to leave the line, go "down the hill" to the parking lot and talk to Doria Lee. Lewis testified that she did not tell anybody that she was quitting. The line was "down" at the time, and Lewis intended to return to work when somebody told them that the line was again functioning.

Debbie Lewis testified that she heard Doria Lee had been fired because her employees were wearing union T-shirts. Lewis was angry, and felt she was the next one to be fired. The other employees felt the same way, according to Lewis. They were concerned that their next supervisor would be Line 1 Supervisor Carrie Evans, who was "mean" and "evil." The employees decided to go "down the hill" and talk to Doria Lee. Debbie Lewis said that the line was down and there were no fish to run. Customary practice in the past had been to allow employees to leave the line with it was down, and return when it was again functioning. Debbie Lewis testified that she planned to return to work as soon as they were called back.

Julie Lee, a witness for Respondent, was also working on line 2 at this time. She testified that she heard employees saying that Doria Lee had been fired and that they were going to see whether this was true. They then left. Lee was asked whether the line was running when the employees left. She replied: "To me it was still running." Asked whether anyone was laying fish, Lee replied that no one was laying fish. She explained this testimony by saying that two employees could not lay fish. Line 1 Supervisor Carrie Evans had told her to shut the line down if no fish were being laid and avoid a "gap in the middle." Accordingly, Lee contended, she shut the line down when the employees left. Julia Lee testified that Line 1 Supervisor Carrie Evans was not present, having gone to the office. Randy Rhodes, a vice president of sales, entered as these events were taking place, and asked Julia Lee what was happening. He did not talk to any of the employees, according to Lee.

Timekeeper Diane Watkins testified that her place of work was near the office. A group of employees—Bridgette Witherspoon, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, and Shirley Aaron—walked out. Watkins asked where they were going, and one of them replied, "Don't worry about writing our names down because we're leaving and we won't be back until they hire Doria (Lee) back." Watkins was uncertain as to who it was that said this, but believed that it was Pamela Witherspoon. It is undisputed that Pamela Witherspoon was not at work that day.

Carrie Hamilton testified that Diane Watkins was in her office sharpening a pencil when the group passed her. Hamilton denied that Watkins asked the group why they were leaving, and denied that any of them spoke to her. Specifically, Hamilton denied that anybody said to Watkins that they were leaving and would not be back until Doria Lee was rehired.

Barbara Lewis, Doria Lee's sister, worked on line 1. She testified that she heard her sister had been fired, and called Doria at about 9:15 a.m. Doria told her that Collins had fired her because her employees were wearing union T-shirts and were walking around. Barbara Lewis affirmed that her morning break started at 10:30 a.m. and that a horn sounded this event. After the horn sounded that morning, she went out of the plant and went down the hill, where she joined the other employees in the parking lot. The penalty for overstaying a break was a writeup.

Line 1 Supervisor Carrie Evans stated that her line was taking a break, and that this started at 10 a.m. Although Evans contended that both lines had breaks at the same time, this was changed so that they were not simultaneous, and she was uncertain as to when this took place. Sheila Hambright, a witness for Respondent, had been a supervisor for 3 months at the time of her testimony. She affirmed that on August 7, 1995, the breaktime on line 1 was 10:30 a.m. and it was at this time that Barbara Lewis went on break. The break lasted for 15 minutes. After becoming a supervisor, Hambright "fussed" at an employee who was 7 minutes late, but did nothing more. Other evidence indicates that employees got writeups being late from breaks. Hambright also testified that Barbara

[9] See also *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986). The complaint alleges that Doria Lee's discharge violated Sec. 8(a)(3). I conclude that it violated Sec. 8(a)(1).

Lewis said that Doria Lee's discharge wasn't "right," and that she, Barbara, was quitting. Hambright replied that Barbara needed her job, and that she should not quit. Lewis agreed and said that she would not quit.

b. Factual conclusions

The line 2 employees left the line and went outside because they heard that Supervisor Doria Lee had been discharged because her employees were wearing union T-shirts. There was no supervisor present at the time, since Doria Lee had been discharged, and Line 1 Supervisor Carrie Evans was in the office.

There is a conflict in the evidence as to whether line 2 was down at the time. Bridgette Witherspoon, Regina Lewis, and Debbie Lewis affirmed that it was down, while Julia Lee contended that it was still running. A careful review of Julia Lee's testimony, some of which is recited above, shows that her meaning was uncertain at times, and that she was less reliable than the three witnesses for the General Counsel. They were truthful in demeanor. I credit their consistent testimony, and find that the line was down when they left.

There is a conflict in the testimony as to whether any member of the group said anything to timekeeper Diane Watkins as they left the plant. Watkins' recall of these events was imperfect, since she believed that it was Pamela Witherspoon who said this, although Witherspoon was not present in the plant. Carrie Hamilton's recall was more accurate, and I credit her denial that anything was said between Watkins and the departing group.

I also find that Barbara Lewis took her break at 10:30 a.m., and that this was the established time for breaks on line 1. This was corroborated by Sheila Hambright; Carrie Evans' testimony is too inconclusive to contradict this finding.

The testimony of the General Counsel's witnesses and of Diane Watkins establishes that Carrie Hamilton, Rosie Aaron, Shirley Aaron, and Brenda Scott were in the group that walked out.

2. The events in the parking lot

a. Testimony of Robert Collins

Plant Manager Robert Collins testified that, at around 9 a.m., a "sales person" told him that employees had walked off the job. He and Company Owner Glover went to the freeze room and asked employees what had happened. The answers were that the employees had "walked off" and that they were "quitting." Collins and Glover then got employees to fill the vacant locations.

b. Testimony of Joe Glover

Glover later stood on a hill near the plant and observed the employees below him in the parking lot. He testified that Sales Vice President Randy Rhodes has told him that Rhodes was in the freeze room and saw the employees leave and heard them say that they quit. Glover agreed that he did not take any independent measures to determine whether the employees had quit. He instructed somebody to call the police, but could not recall who it was that he instructed to do so. He gave this instruction because he was told that the employees would not leave the premises. The employees were standing next to a security guard, but Glover did not speak with the guard.

Glover was asked whether he gave the officer a list of names, and replied that he did not think that he did. The company owner was asked how the officer could be expected to know the people he was supposed to escort off the premises. Glover replied that the Company had an "in-and-out" clocking system, and that the policeman would not have to know their names if he knew they worked for the Company and were not at their jobs.

c. Testimony of Officer L. C. Hoggle

L. C. Hoggle, an officer with the Greensboro Police Department, testified that he received a call at 10:45 a.m. to go to Respondent's plant and talk to Company Owner Glover. Hoggle arrived at 10:49 a.m., stopped at the security gate, and then drove up the hill where Glover was standing next to the plant. Glover said that some people had quit and walked off the job and would not leave the premises. Glover wanted the officer to remove them. Hoggle testified that Glover gave him a piece of paper with names on it.

Hoggle then drove down the hill, approached the employees, and asked whether they were the ones who had "quit." Hoggle first testified that they answered, "Yeah," but on cross-examination agreed that they replied that they were the ones who had "walked off the job." Hoggle then told them that they were on private property, and instructed them to leave, which they did without incident. Hoggle denied telling any employee that they were discharged.

d. Testimony of Barbara Lewis

Barbara Lewis testified that, as she left on her 10:30 a.m. break to join the group in the parking lot, she saw a police car arriving. The car drove up to where Glover was standing at the top of the hill. After she joined the group, the police car came back down the hill. An officer got out, holding a piece of paper which Glover had given him. He read off the names of the individuals in the group, including Lewis, and said that they were "terminated" and had to leave the property.

e. Testimony of Bridgette Witherspoon

At one point, Bridgette Witherspoon testified that the officer said they were terminated. Later, she corrected this and affirmed that the policeman said that Glover wanted the employees off the property, and that he, the officer, would show them the way. Witherspoon asserted that an employee—she was not sure who it was—asked the security guard to call Glover and asked permission to speak to Glover. This took place before the officer came down the hill.

On redirect examination by the General Counsel, Witherspoon stated that the reason the security guard was approached was the fact that the security guard "wouldn't let us back up at the gate . . . . We wanted to work because we needed our jobs." Counsel for the General Counsel then asked that the witness be excused from the hearing room, and stated that the witness was "either greatly confused or fabricating" about this testimony. Counsel for the Charging Party stated that the General Counsel's statement was "highly bizarre."[10] On redirect examination by the Charging Party, the witness stated that she did not understand the question about going to the guard shack, and denied that any of the employees did so.

Respondent argues that "this incident illustrates the fact that CGC's witnesses . . . have fabricated an entire case out of the fact that they quit their jobs."[11]

The totality of the evidence establishes that the employees did not in fact quit their jobs, as shown hereinafter. Of the two alternative explanations for Bridgette Witherspoon's testimony given by the General Counsel, I accept the explanation that the witness was confused rather than that she was fabricating. The General Counsel's case does not depend on Witherspoon's testimony alone, and there is no evidence to support Respondent's argument that the General Counsel's witnesses in effect engaged in a conspiracy to fabricate the entire case.

[10] I correct the word "bazaar" on L. 7 of p. 221 to read "bizarre."
[11] R. Br. fn. 23, 39–40.

f. Testimony of Regina Lewis

Regina Lewis testified that she saw Glover give the officer a piece of paper. He came down the hill, called off the names, and said that Glover had "terminated" them because they were trespassing. They had to leave immediately.

g. Testimony of Debbie Lewis

Debbie Lewis testified substantially to the same effect as Barbara Lewis and Regina Lewis.

3. Factual conclusions

Glover's testimony discloses that he did not know the identities of the employees in the parking lot, and made no effort to determine whether they quit. However, he has maintained that they did, and it is probable that he said the same thing to Officer Hoggle, as the two of them testified. It is therefore likely that Toggle repeated this assertion to the employees, rather than telling them that they were discharged. Nonetheless, the employees did not agree that they had quit, but had merely walked off the job.

4. Factual summary

The credited evidence shows that the employees heard that their supervisor (Doria Lee) had been discharged because they were wearing union T-shirts. They felt that they would be the next to be fired, and were also concerned that they might be supervised by a new and undesirable supervisor.

The employees decided to "protest" and to go down a hill to the parking lot and talk to Doria Lee. None of the employees told anybody that they were quitting, except Barbara Lewis. She stated this in a conversation with Sheila Hambright, and immediately changed her mind upon advice from Hambright. Although Sales Vice President Randy Rhodes came into the freeze room when they were leaving, he did not talk to them (according to Respondent's witness Julia Lee). There was no other supervisor present.

Line 2, where the employees worked, was "down" at the time, i.e., there were no fish to process. This had happened in the past, and the practice had been to allow employees to go to the breakroom or down the hill until the line was again functioning. The employees intended to return to work when they were informed that the line was again functioning. With the exception of Barbara Lewis, the employees left at about 9 a.m. or shortly thereafter and went down the hill to the parking lot. Barbara Lewis, who worked on line 1, called her sister Doria Lee, left at her breaktime of 10:30 a.m., and joined the group in the parking lot.

Company Owner Glover stood on a hill near the plant and observed the employees standing in the parking lot. Sales Director Randy Rhodes told Glover that the employees had quit. Glover did not talk with the employees and made no independent investigation of Rhodes' statement. He caused somebody to call the police. Although Glover contended that he did not know the identities of the employees in the parking lot, he gave the officer who arrived a list of their names. Glover told the officer that the employees had quit.

The officer went down the hill to the employees. There is no evidence that they were damaging property, causing a disturbance, or interfering with traffic. The officer asked them if they were the employees who had "quit." They replied that they were the employees who had "walked off." The officer then read their names from the list, told them that they were on private property, and instructed them to leave. They did so without incident.

5. Legal conclusions

It is settled law that employees have the right to engage in concerted activities, including the right to leave their work concertedly, where such activities have a reasonable relationship to the employees' interest in their working conditions. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Guernsey-Muskingum Electric Co-Op.*, 285 F.2d 8 (6th Cir. 1960); *Blue Star Knitting, Inc.*, 216 NLRB 312 (1975). "[T]he spontaneous banding together of employees in the form of a work stoppage as a manifestation of their disagreement with their employer's conduct is clearly protected activity (authorities cited)." *Vic Tanny International*, 232 NLRB 353, 354 (1977).

Respondent argues that the employees were not engaged in protected activity, and cites *Puerto Rico Food Products Corp. v. NLRB*, 619 F.2d 153 (1st Cir. 1980). The court stated two criteria for determining whether employee action over supervisory staffing will be protected. First, the employee protest must be a protest over their actual conditions of employment. Second, the means of protest must be reasonable. In *Puerto Rico Food Products*, according to the court (disagreeing with the Board), the only evidence in support of the first criterion was the fact that the supervisor befriended the employees and cautioned them about visible union activity (619 F.2d at 156).

The court stated:

> This evidence is, we think, irrelevant. The pertinent question . . . is whether the employee protest over a change in supervisory personnel is in fact a protest over the actual conditions of their own employment.
>
> In answering this question, the focus, at least preliminary, must be upon the employees' subjective state of mind. Thus, the possibility that (the supervisor) occasionally cautioned the employees concerning their union activity is without force unless we first determine that the employees were protesting his discharge because, for example, they feared that they had witnessed the opening salvo in an attack upon their union activities. The mere fact that (the supervisor) was a popular supervisor is not one of the recognizable conditions of their employment (id.).

The facts in the case at bar show that the employees' protest over Doria Lee's discharge was a protest over the conditions of their own employment, and that that discharge was an "opening salvo in an attack upon their union activities." The employees believed that their supervisor was discharged because they were wearing union T-shirts—a protected activity. They also believed that they would be the next to be fired—which in fact took place. Their protest over Doria Lee's discharge thus clearly concerned their own working conditions.

Did the employees quit, as Respondent contends? There is no credible evidence that any of them told management that they quit. They testified that they intended to return to work when line 2 was again functioning. Their action in remaining in the parking lot rather than leaving the premises is consistent with this testimony.

The Court of Appeals for the Tenth Circuit has stated:

> The declarations and acts of the employees at the time of the walkout . . . should be considered (authority cited). We consider this to mean the words and acts immediately preceding and simultaneously accompanying the walkout, including the declarations made to the employer and the facts and circumstances that surrounded it. The record does not show that the

> maids unequivocally announced to the employer that they quit. It certainly does not disclose an intention or motivation to do so. The workers had an inextricable interest in their supervisor insofar as their work conditions were concerned. When she was separated from them they reasonably felt they had no other recourse but to walk off the job, as originally planned, in protest over the work conditions . . . *NLRB v. Okla-Inn*, 488 F.2d 498, 503 (1973).

The Court of Appeals for the Eighth Circuit has stated:

> The employees activities . . . remained protected because they waited peacefully on the petitioner's premises to present their complaints and because their conduct did not amount to a significant occupation of the premises. To hold otherwise would render the protection set forth in Section 7 of the Act meaningless. [*Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989).]

Respondent cites *Can-Tex Industries v. NLRB*, 683 F.2d 1183 (8th Cir. 1982), where the court disagreed with the Board's finding of an unlawful discharge. The court grounded its disagreement on the fact that the employees turned off machines in order to halt production. There is no such evidence in its case.

Respondent cites *Waco, Inc.*, 273 NLRB 746 (1984). In that case the employees gathered in the lunchroom and demanded that the employer meet with them as a group. He said he would meet with them individually, but refused to meet as a group. The employer informed them that they could either go back to work or punch out and leave the premises. The employer discharged them after about 2–1/2 hours of their presence in the lunchroom.

The Board concluded that this was a lawful discharge. The employees "had overstepped the boundary of a protected, spontaneous work stoppage and were occupying the facility in a manner which was unprotected . . . [T]he employees had ample time to consider the Respondent's demand that they choose between working and carrying on their protest off the Respondent's premises. The employees gave no indication that they intended to accept either alternative, and, in fact, the employees' testimony indicates that they had no plan to give up their occupation of the Respondent's lunchroom." (Id. at 746–747.)

In the case at bar, the employees were not "occupying" the parking lot—they were simply there by the guard shack and were not interfering with anything. Company Owner Glover did not give them a choice of going back to work or leaving the premises. He did not even talk to them and caused the officer to order them to leave the premises. The employees intended to return to work when line 2 was again functioning, but were not given this opportunity. Accordingly, *Waco* is inapposite.

I conclude that the officer's instruction to these employees to leave the premises pursuant to Glover's order constituted discharges of the employees. *NLRB v. Ridgway Trucking Co.*, 622 F.2d 1222 (5th Cir. 1980).

The complaint alleges that Respondent discriminatorily discharged the employees listed above on August 7, 1995. In order to establish a discriminatory discharge, the General Counsel must make a prima facie case sufficient to support an inference that protected conduct was a motivating factor in the employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel must supply persuasive evidence that the employer acted because of antiunion animus.[12]

The General Counsel has presented a strong prima facie case to support this inference, and Respondent has not rebutted it. Accordingly, I find that Respondent, on August 7, 1995, discharged Carrie Hamilton, Debbie Lewis, Barbara Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Bridgette Witherspoon, and Brenda Scott because they supported the Union and engaged in protected activities. Respondent thereby violated Section 8(a)(3) and (1) of the Act.

6. The discharge of Pamela Witherspoon

1. Summary of the evidence

The complaint as amended at the hearing alleges that Respondent discharged Pamela Witherspoon on August 8, 1995, because she supported the Union and engaged in other protected concerted activities.

Pamela Witherspoon started working for Respondent in 1994. When the union movement started, she attended union meetings and wore a union T-shirt. Her supervisor, Doria Lee, asked her why she wanted the Union in the plant. Witherspoon replied that she wanted more money. Doria Lee then wrote Witherspoon's name on a piece of paper, together with her answer. Later the same day, Supervisor Greg Crawford asked Witherspoon the same question and received the same answer.

The Company provided two ways that employees could protect their clothing when they worked. One method was a blue plastic apron, and the other was a clear plastic bag in which the employees cut holes. Witherspoon testified that she made the decision as to which device to use, and chose the plastic apron. Prior to August 8, 1995, no supervisor had ever told her that she had to wear the plastic bag.

Witherspoon was absent from work on April 7. She reported to work on August 8 and asked for an apron. The employee who handed them out said that she had to wear a plastic bag. According to Witherspoon, she then went to Supervisor Greg Crawford and asked for her blue apron so that she could go to work. Crawford replied that if she did not put on the plastic bag, she was to give him her "card and i.d.," go to the breakroom and sit down.

Witherspoon did so. Plant Manager Collins came in and asked why she was not wearing a white bag. He said that they had cameras in the place that day, and that they could not see the black people without the plastic bags. Collins did not tell Witherspoon the reason for the cameras. He told Witherspoon that she did not work there any more, and to go "down the hill."

Greg Crawford testified that when Witherspoon came in, she asked him whether she still had a job. (Witherspoon denied asking this question.) Crawford then told her to get her gloves and knife and go to work. (Witherspoon denied that Crawford said this.) Witherspoon replied that she was not going to do so, Crawford averred, because the employees on the belt did not know what they were doing. Crawford replied that if she was not going to work, she might as well go home. Witherspoon said nothing about wearing an apron, according to Crawford.

Witherspoon denied that Crawford made any of the statements asserted by Crawford, or that she made any of the responses attributed to her. She testified that she did not refuse to work, but merely asked for her blue apron so that she could go to work.

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[12] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1989), approved in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

Plant Manager Collins testified that Sales Director Randy Rhodes was making pictures for a sales video, and had a camera. They wanted the employees to wear white bags so that they would look clean. Supervisor Greg Crawford denied knowledge that any film or brochures were being made that day. Witherspoon denied that anybody said anything to her about the reason for the cameras, or that videos were being made for brochures.

Plant Manager Collins denied talking to Pamela Witherspoon about her discharge. He heard that some employee had been discharged for refusing to wear a "white button," but was not certain that it was Pamela Witherspoon.

2. Factual and legal conclusions

Respondent's rationale for the asserted "white bag" requirement on August 8—filming for a sales video—was asserted by Plant Manager Collins but denied by Supervisor Crawford (as well as by Pamela Witherspoon). Randy Rhodes, supposedly supervising the filming, did not testify. In light of these contradictions and omissions, I do not credit Collins' testimony about the filming. It follows that there was no business reason for refusing Pamela Witherspoon's request for an apron, as she had done in the past without objection.

The issue between Crawford and Witherspoon was her request for her customary apron. I credit Witherspoon's denial that Crawford told her to get gloves and knife and go to work, or that she replied that she would not work with the employees because they did not know what they were doing. Since her former colleagues had been discharged the day before and presumably replaced, Witherspoon would have had no way of knowing the new employees' capabilities.

Crawford's denial that Witherspoon said anything about wearing an apron is not credible—Plant Manager Collins agreed that somebody had been discharged for refusal to wear a "white button," a garbled description but sufficient corroboration of Witherspoon.

Who discharged Witherspoon? Crawford testified that he said she might as well go home after refusing to work with employees who did not know what they were doing. However, as indicated Witherspoon never said this, and we are left with Witherspoon's testimony that Crawford told her to give him her card and i.d. and go to the breakroom.

In light of the contradictory testimony of Respondent's witnesses, and because Pamela Witherspoon was a truthful witness, I credit her testimony that Crawford told her to go to the breakroom, and that Collins then told her that she did not work there any more. I conclude that Collins thereby discharged Witherspoon on August 8, 1995.

Pamela Witherspoon was a union activist, and had been interrogated by two supervisors. Respondent's animus is established by the unlawful statements of the management representatives, and by the unlawful discharges of eight employees the day before. Respondent has not rebutted the General Counsel's case under the *Wright Line*.[13]

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Southern Pride Catfish is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Local 1996 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) Creating an impression of surveillance of its employees' union activities and sympathies by maintaining lists of union supporters and telling employees that it was at management's direction.

(b) Coercively interrogating its employees concerning their union sympathies.

(c) Threatening its employees with reduction in wages, loss of jobs, and plant closure if they voted for the Union.

(d) Discharging Supervisor Doria Lee on August 7, 1995, because she failed to support effectively Respondent's efforts to defeat the union movement.

4. Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) Discharging Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, and Bridgette Witherspoon on August 7, 1995, because of their union activities and sympathies.

(b) Discharging Pamela Witherspoon on August 8, 1995, because of her union activities and sympathies.

(c) Promulgating a rule restricting its employees' bathroom breaks because of their union activities and sympathies.

5. The foregoing unfair labor practices constitute unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as found herein.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

I shall recommend that Respondent be ordered to offer Supervisor Doria Lee, Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, Bridgette Witherspoon, and Pamela Witherspoon immediate reinstatement to their former positions, dismissing if necessary any employee hired to fill the position, and to make them whole for any loss of earnings she may have suffered by reason of Respondent's unlawful conduct, by paying her a sum of money equal to the amount she would have earned from the date of her unlawful discharge to the date of an offer of reinstatement, less net interim earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[14]

I shall also recommend that Respondent remove from its records all references to its unlawful discharges described above, and inform each employee in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline of them.

I shall further recommend that Respondent rescind its rule restricting its employees' bathroom breaks, and reinstate the practice in effect prior to the advent of the union campaign.

I shall also recommend the posting of notices.

[13] Supra, fn. 12.

[14] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).

The Objections

Objection 1

This objection alleges that the Employer made threats of plant closure in order to influence the outcome of the election. I have already found that the Employer made such threats. Accordingly, objection 1 is sustained.

Objection 2

The objection alleges that the Employer threatened to layoff certain of its employees in order to affect the results of the election. I have that Respondent, by Joe Alecs, told employees that they would have to look for other jobs if the Union won. Accordingly, objection 2 is sustained.

Objections 3 and 4

These objections allege that the Employer openly kept records of employees wearing Union T-shirts in order to intimidate them, and engaged in surveillance of its employees' union activities. I have already found that the Employer engaged in this conduct. Accordingly, these objections are sustained.

Objection 5

The objection alleges that the Employer threatened certain employees with job loss if the Union won the election. I have already found that the Employer engaged in this conduct. Accordingly, this objection is sustained.

Objections 6 through 10

These objections allege that the Employer provided a "loaded" employee eligibility list (Objection 6), that it used supervisors as election observers (Objection 7), that the Employer's election observers maintained lists of voters (Objection 8), that the Employer discharged Bobby Joe Connor due to his union activities and in order to influence the outcome of the election (Objection 9), and that the Employer gave or promised employees loans in order to affect the result of the election (Objection 10).

The evidence is insufficient to support these objections. Accordingly, they are dismissed.

The meritorious objections warrant setting the election aside and directing a new election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER AND DIRECTION OF SECOND ELECTION[16]

The Respondent, Southern Pride Catfish, Greensboro, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating an impression of surveillance of its employees' union activities by maintaining lists of union supporters and telling employees that it was at management's direction.

(b) Coercively interrogating employees concerning their union activities or sympathies.

(c) Threatening employees with reduction in wages, loss of jobs, or plant closure if they vote for the Union.

(d) Discharging supervisors because of failure to support effectively Respondent's efforts to defeat the Union.

(e) Discouraging membership in United Food and Commercial Workers Union, Local 1996, or any other labor organization, by discharging or otherwise discriminating against employees because of their activities on behalf of a labor organization or other concerted protected activities.

(f) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Doria Lee, Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, Bridgette Witherspoon, and Pamela Witherspoon, immediate and full reinstatement to their former positions, or, if any such position no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired to replace any of them, and make each of them whole for any loss of earnings she may have suffered by reason of Respondent's unlawful discharge of her, in the manner described in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its records all references to its unlawful discharges of Doria Lee, Barbara Lewis, Carrie Hamilton, Debbie Lewis, Regina Lewis, Rosie Aaron, Shirley Aaron, Brenda Scott, Bridgette Witherspoon, and Pamela Witherspoon, and inform each of them in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline of them.

(c) Within 14 days from the date of this Order, rescind its rule restricting the bathroom breaks of its employees, and reinstate the practice concerning bathroom breaks which was in effect prior to the advent of the union movement.

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[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] Subsequent to the hearing, Respondent filed a motion to reopen the record so as to take the testimony of Board Agent Morris Newman. The motion states that the General Counsel denied Respondent's request at the hearing to call Newman as a witness. Respondent's asserted reason was that Newman could contradict the testimonies of Bridgette Witherspoon and Doria Lee.

The motion asserts that Witherspoon's testimony sought to be contradicted describes a list of voters wearing union T-shirts kept by the Company's observer during the election. This would have been visible to Board Agent Newman, the motion asserts.

The testimony from Doria Lee sought to be contradicted is her testimony that she told Board Agent Newman during his investigation that she was discharged because her employees wore union T-shirts, but that Newman failed to record it in her affidavit.

Sec. 102.118 prohibits a Board employee subject to the jurisdiction of the General Counsel from testifying in a proceeding of this nature without the written consent of the General Counsel.

Counsel for the General Counsel filed an opposition to Respondent's motion. He points out that the actions of Respondent's election observer were not the subject of an objection in Case 10–RC–14631 nor a complaint allegation in Case 10–CA–28960. Counsel further argues that the contention that Newman saw the observer is purely speculative. As I point out in my decision, the General Counsel's case does not depend upon the testimony of Bridgette Witherspoon alone (p. 631).

With respect to the testimony of Doria Lee, Plant Manager Collins' denial that he spoke to Lee about her employees wearing union T-shirts is noted in the decision, together with the other statements of Collins and Plant Owner Glover. Lee was available for cross-examination, and Respondent cross-examined her. The reasons for crediting Lee rather than Collins on this issue are set forth on p. 633 of the decision.

I conclude that there are no compelling circumstances which would justify reopening the record to take the testimony of Board Agent Newman on these matters. *Sunol Valley Golf Co.*, 305 NLRB 493 (1991). Accordingly, Respondent's motion is denied.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 13, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[Direction of Second Election omitted from publication.]

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."